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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MCM PARTNERS, INC.,

Petitioner,

v.

ANDREWS-BARTLETT & ASSOCIATES, INC., doing business as ANDREWS-BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON, and, GES EXPOSITION SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a release applied to bar a civil action under §1 of the Sherman Act challenging a continuing conspiracy in unreasonable restraint of trade is void as against public policy?
2. Whether a new post-release agreement is necessary to constitute a new post-release violation of §1 of the Sherman Act?
3. Whether a release applied to bar a civil action challenging a continuing violation of the Racketeer Influenced and Corrupt Organizations Act is void as against public policy?

LIST OF PARTIES

Plaintiff: MCM Partners, Inc.
(no parent or subsidiaries)

Defendants: Andrews-Bartlett & Associates, Inc.
Andrews-Bartlett Exposition Services
GES Exposition Services, Inc.
(Viad Corp., directly or indirectly, owns greater than 10% of the stock of GES Exposition Services, Inc., and Andrews-Bartlett & Associates, Inc.)

Harold Bartlett
Bonnie Aaron
Freeman Decorating Company*
Doug Van Ort*
David Leithleiter*

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* Dismissed from action in the United States Court of Appeals for the Seventh Circuit pursuant to settlement reached after filing appeal.

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PETITION FOR WRIT OF CERTIORARI

MCM Partners, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 17, 1998.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 161 F.3d 443 (7th Cir. 1998). The underlying judgment of the trial court is reported at 1997 WL 306577 (N.D. Ill. 1997). The opinions of the District Court and the Court of Appeals are reproduced in the Appendix to this Petition.

JURISDICTION

On November 17, 1998, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the judgment entered by the trial court. On January 28, 1999, the United States Court of Appeals for the Seventh Circuit denied Appellant's Petition for Rehearing with Suggestion of Rehearing *En Banc*. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATUTES INVOLVED

§1 Of The Sherman Act (15 U.S.C. §1)

Contracts, Combinations and Conspiracies in Restraint of Trade

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Racketeered Influenced And Corrupt Organizations Act (18 U.S.C. §1962)

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the

open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which effect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

STATEMENT OF THE CASE

Defendant, Andrews-Bartlett & Associates, Inc., d/b/a Andrews-Bartlett Exposition Services (hereinafter collectively referred to with all other defendants as "A-B") is an exhibition contractor in the business of putting on trade shows at McCormick Place, the largest trade show venue in Chicago, Illinois, and at other venues. Plaintiff, MCM Partners, Inc. ("MCM"), was a company which leased forklifts and other equipment to exhibition contractors which put on trade shows at venues such as McCormick Place in Chicago, Illinois. MCM competed with other companies, including O.G. Services ("O.G."), a company owned and operated by a steward of the Teamsters Union, that also leased equipment to exhibition contractors for use at McCormick Place.

On January 17, 1992, A-B agreed to use MCM to provide forklifts and other equipment for two trade shows to be held at McCormick Place. A-B subsequently issued two purchase orders to MCM covering equipment for use during the National Restaurant Association and Food Marketing Institute shows.

Subsequently, representatives of A-B met with representatives of Local 714 of the Teamsters to discuss A-B's forklift rentals at McCormick Place. At that time A-B stated that it was not satisfied with O.G. and would be using MCM to supply equipment for those two shows. A-B confirmed that discussion by letter of April 8, 1992, but solicited the Teamster's input as to equipment rentals for future trade shows. That very letter indicated that the Teamsters agreed to labor concessions in exchange.

On April 17, 1992, Mr. Bartlett of A-B met first with representatives of the Teamsters and then with Mr.

Boscarino, the owner and operator of O.G. After their meeting, O.G. offered A-B a 10% discount on total rentals for the year to be paid at the end of the year if A-B rented equipment solely from O.G. A-B would not receive the discount if it used MCM or any supplier other than O.G. After these meetings, A-B canceled the two outstanding MCM purchase orders. On April 17, 1992, A-B wrote MCM stating that the purchase orders were being canceled due to an "advance agreement" with O.G.

On April 22, 1992, MCM sued O.G. and others (but not A-B), asserting that defendants had violated RICO and tortiously interfered with MCM's business by causing A-B to cancel the purchase orders. No antitrust claims were alleged in that suit. On April 24, 1992, a settlement was reached which included A-B's agreement to honor the two outstanding purchase orders. Nevertheless, at that time, Mr. Bartlett informed his subordinates at A-B that O.G. was to remain A-B's exclusive supplier pursuant to the Agreement he had reached with O.G.

In early May, 1992, MCM executed a settlement agreement and release ("Release"). A-B agreed to honor the original purchase orders issued to MCM for the National Restaurant Association and Food Marketing Institute shows. MCM agreed to release A-B from any and all claims arising before April 25, 1992, including those alleged in the complaint, as well as those relating to the two purchase orders and the January 17, 1992, letter to MCM, which were attached as exhibits to the settlement document.

In July, 1992, MCM received a letter from an attorney representing A-B instructing it to have no further

contract with A-B, except through counsel. Pursuant to the April 17, 1992, agreement, A-B did not rent from MCM after June, 1992, until GES Exposition Services (A-B's successor) used MCM in late 1994. However, A-B and GES continued to rent from O.G. through at least 1996.

Following its continued exclusion, MCM filed a lawsuit against A-B alleging violation of the antitrust and RICO statutes. The district court granted summary judgment against MCM finding that the release previously executed by MCM in connection with the prior lawsuit barred MCM's claims, which the Court concluded were based only on pre-Release conduct. On November 17, 1998, the Seventh Circuit affirmed.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not been, but should be settled by this Court, and the Courts below have decided an important question of federal law in a manner that conflicts with relevant decisions of this Court:

1. The court below erred in holding that a civil action under §1 of the Sherman Act challenging a continuing conspiracy in restraint of trade was barred by a prior release.

MCM challenged the actions of A-B as an ongoing conspiracy in unreasonable restraint of trade. The courts below held that MCM's cause of action was barred by the release executed in connection with the prior non-antitrust litigation. While apparently accepting that a release is void as against public policy if it

purports to release future antitrust violations, the courts below attempted to distinguish this case by holding that no "future" violations of the antitrust laws were involved. The Seventh Circuit held, without citation to any authority, that MCM was required to prove "a new post-Release agreement" in order to establish a cause of action not barred by the Release. Consequently, the Seventh Circuit rejected MCM's position that the Release was void as against public policy because it allowed a continuation of a conspiracy in unreasonable restraint of trade. The Court below has, therefore, held that a release is valid even if it permits a continuing conspiracy in unreasonable restraint of trade to continue. This holding presents a important federal question which has not previously been settled by this Court.

Numerous federal courts have now clearly held that a purported release of future antitrust violations is void as against public policy. *Main Line Theatres, Inc. v. Paramount Pictures Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir.), *cert. denied*, 370 U.S. 939 (1962); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 895-97 (3rd Cir. 1975); *Redel's, Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); and *Marketing Assistance Plan v. Associated Milk Producers, Inc.*, 338 F.Supp. 1019 (D.C. Tex. 1972). Underlying these decisions is a recognition that private enforcement of the antitrust laws is an important element of the legislative scheme of preventing unreasonable restraints of trade. As the court in *Redel's, Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974), cogently explained, "[a] right conferred on a private party by federal statute, but granted in the public interest to effectuate legislative policy, may not be released if the legislative policy

would be contravened thereby". Simply put, to absolve a party from future violations of the antitrust laws would permit a restraint of trade which would adversely impact not only the parties to the release, but the public as well.

The same reasoning applies with equal force to continuing conspiracies in unreasonable restraint of trade. To absolve the parties to a conspiracy entered into prior to a release from liability for continuing the conspiracy after the release not only impacts the parties to the release but the public as well. There is simply no difference between a future violation and a continuing violation for these purposes. The anti-competitive impact is suffered even if no new post-release agreement is proven. The continuation of the pre-release conspiracy or agreement is sufficient to create the adverse impact upon competition. The courts below failed to recognize that fact and have thereby weakened the legislative policy protecting competition embodied in §1 of the Sherman Act. This Court should address this issue to ensure that the Sherman Act's purpose of protecting competition is fulfilled.

2. The court below erred in holding that a new post-release agreement was necessary to constitute a new post-release violation of §1 of the Sherman Act.

A second significant error in the decision below is the failure of the court to recognize that a new cause of action under §1 of the Sherman Act occurs when an act in furtherance of a conspiracy injures a plaintiff. The Seventh Circuit's insistence upon proof of a new agreement to create a new post-release cause of action under

the Sherman Act rejects this well-established premise. For that reason, the decision below conflicts with the relevant and controlling decisions of this Court.

This Court has always adhered to a single understanding of the nature of an ongoing conspiracy in unreasonable restraint of trade. That understanding is premised upon the conclusion that each time a party is injured by an act in violation of antitrust laws, a new cause of action accrues. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court defined the fundamental nature of continuing antitrust violations. In determining when an antitrust action accrued for purposes of the statute of limitations, this Court explained that

> In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id. at 338. In *Zenith*, the conspiracy was formulated substantially more than five years before the period for which damages were sought. Nonetheless, the Court held that Zenith's action was not time barred because damages were suffered within four years of filing suit.

Similarly, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968), this Court held that the damages incurred as a result of a supplier's illegal lease-only policy could be recovered even though the initial injury resulting from the illegal acts was suffered, many years before the lawsuit was filed.

There, the continued application of the lease-only policy inflicted "continuing and accumulating" harm, the gravamen of a continuing conspiracy in restraint of trade.

The Seventh Circuit decision has altered and conflicts with this fundamental understanding of the nature of an ongoing conspiracy in violation of the antitrust laws. The decision below undercuts the controlling precedent by holding that the existence of a cause of action now depends on the timing of the formation of the conspiracy and not the time the damages are suffered. This Court should address this issue to reaffirm that in an ongoing conspiracy, a new cause of action accrues each time an act causing injury occurs, and the date of the initial formation of the conspiracy is irrelevant.

3. The court below erred by holding that an ongoing violation of RICO can be released.

On a question of first impression, the Seventh Circuit held that an ongoing violation of RICO can be released. However, the same reasoning that governs antitrust actions should govern RICO actions.

To allow the release of ongoing and future violations of RICO would be contrary to public policy. Specifically, the predicate acts involved in this case, *i.e.*, violations of the Taft-Hartley Act, continued after the release. The Taft-Hartley violations arose each time A-B contracted with O.G. to rent equipment. Those acts caused the injury suffered by MCM.

As with the antitrust laws, RICO protects the public at large. To absolve defendants by giving effect to the release would jeopardize that interest by insulating defendants' continuing RICO violations. This Court should

address this important issue to preserve the legislative scheme of enforcement embodied in RICO.

CONCLUSION

This case presents important federal questions related to the enforcement of the antitrust laws and RICO. The decision below renders the Sherman Act and RICO impotent to prevent conspiracies in violation of those statutes from being continued once a private action has been settled. This Court should address these questions to preserve the ability of private plaintiffs to continue enforcing the law in furtherance of clear legislative policy.

Respectfully submitted,

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